ANTHONY J. STASKUNAS

STATE REPRESENTATIVE • 15TH ASSEMBLY DISTRICT

Assembly Bill 100
June 2, 2011
Assembly Committee on Criminal Justice & Corrections

Chairman Bies and members of the Assembly Committee on Criminal Justice & Corrections, I am the Assembly author of AB 100, the internet crimes against children proposal. Thank you for scheduling this hearing so expediently on this important proposal.

We all know that there is potential danger lurking when our children log onto our home computers to communicate with friends or play games. However, most of us don't think that our children could fall victim to these online predators.

Assembly Bill 100 will help our local law enforcement agencies prosecute computer crimes against children to the fullest extent possible and will protect the privacy of evidentiary images.

Every day across the state law enforcement agencies have undercover police officers who are portraying themselves online as children or as adults who are willing to make their children available with these predators. In most of these cases, suspects are arrested after traveling to a designated meeting site fully intending to engage in sexual activity with a child. The only reason these suspects don't follow through is because the person they have been communicating with is an undercover police officer and not a child.

Under current law the maximum penalty for these offenders who arrange meetings and attempt to have sex with a child is ½ of what the sentence would be if they had completed a sex crime.

Assembly Bill 100 would give Judges the ability to sentence an individual convicted of attempting to have sex with a child to the same penalties as if they had completed the crime. This is similar to how our state prosecutes and sentences individuals for drug crimes. If drugs are sold to an undercover agent, the offender is still charged the same as if they were selling them to a user.

The other important component to Assembly Bill 100 is that it protects the privacy of all sexually explicit computer images and videos of the child victims.

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Online predators often have collected sexually explicit images or videos of their child victims. AB 100 further protects children by making it more difficult for their images to be copied or shared. Defense attorneys would be able to view and inspect images, but would not be able to obtain possession of them. These changes align state pretrial procedure in child pornography cases with the federal procedures.

The method of duplicating these sensitive images has occasionally been challenged by the defense. By prohibiting duplication of images, it eliminates concerns or questions about the possibility of altering the evidence.

AB 100 does allow a Judge to order that a copy of the material must be provided to the defense in cases when the court finds that the material wasn't previously made available to the defense.

Wisconsin was one of the first states to establish an Internet Crimes Against Children Program and we have become a national leader. With the advancement of Assembly Bill 100 we will provide our courts with the option of longer prison sentences for offenders while protecting victims from being victimized again.

Last session I worked with Attorney General Van Hollen to develop this legislation. 2009 Assembly Bill 769 received overwhelming support in both Assembly and Senate committees as well as from the full Assembly. Unfortunately, '09 AB 769 was not scheduled for a final vote in the Senate prior to the end of the session. The only difference between AB 100 and last session's proposal is that this bill more clearly specifics that the commission of the crime would not have to involve an actual child.

Mr. Chairman and members, thank you for your kind attention today. I would be happy to answer any questions you may have.

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June 1, 2011

FROM: Marla Stephens, Appellate Division Director
RE: SB 56/AB 100 concerning limitations upon defense access to evidence in child pornography cases

Analysis by Legislative Reference Bureau:

> Under current law, a district attorney must disclose to the defense, and permit the defense to inspect, copy, or photograph, any physical evidence that the district attorney intends to use as evidence against that defendant in a trial. [*See* Wis. Stats. s. 971.23 (1).]
>
> Under the bill[s], if the evidence is a recording of a child engaging in sexually explicit conduct, the defense may inspect the recording only in a location maintained by the court or a law enforcement agency, one of which must, under this bill, retain possession, custody, and control of the recording and must provide the defense opportunity to examine, inspect, and view the recording. The defense may receive a copy for limited purposes only if a court finds that the defense has not had opportunity to examine, inspect, or view the recording. [*See* sec. 7 of each bill creating s. 971.23 (11).]

The bills create an uneven playing field by forcing defense attorneys to prepare for trial with highly restricted access to material evidence. Specific concerns for the SPD include the additional expense in attorney, investigator and expert costs, the difficulties in arranging access to the evidence by the attorney and an incarcerated client, the limitations upon expert analysis of the evidentiary recordings, the legal problems posed by the bill, and implementation experience in other jurisdictions.

The bills closely mirror a provision in the Adam Walsh Act, Title 18 § 3509 (m), U.S. Code.[1] The rationale for the federal law was that "every instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and a repetition of their abuse," and therefore "imperative to prohibit the reproduction of child pornography in criminal cases."[2] Assuming that is true, the harm is the same wherever the viewing occurs – in a government office or in a defense attorney's private office.

Defense experts

To understand the implications of the bills, and how they affect a defendant's ability to defend against a child pornography charge, it is helpful to review the common issues in the cases and how a defense attorney investigates the availability of a defense.

The two most frequent defenses in computer-based cases examine whether the images depict an actual child or a digitally-altered adult and whether the defendant knowingly possessed or received the image.

Whether the image depicts an actual child is important in light of the U.S. Supreme Court's holding in ***Ashcroft v. Free Speech Coalition***.[3] In ***Ashcroft***, the Court held that if an image purporting to depict a minor does not depict an actual minor, the image does not constitute child pornography, and therefore, presumptively receives First Amendment protection.[4]

Whether a defendant knowingly possessed or received child pornography is critical because knowledge or intent is an essential element of every child pornography charge. Given the popularity of Internet chat

[1] Content from Friedman, Ian and Walter, Kristina, *How the Adam Walsh Act Restricts Access to Evidence,* THE CHAMPION, January/February 2007, has been adopted to address the Wisconsin bills.
[2] H.R. 4472, 109th Cong. §601(2) (D) (2006). The Supreme Court recognized this principle in *New York v. Ferber*, 458 U.S. 747, 759 (1982).
[3] 535 U.S. 234 (2002) (Kennedy, J.).
[4] The image could still be found to be obscene, in which case it falls outside the scope of First Amendment protections and likely constitutes contraband.

rooms and peer-to-peer file sharing programs, there are legitimate ways by which an image of alleged child pornography can appear on a hard drive without the user's knowledge. It is not uncommon for defense experts to uncover that certain images were downloaded onto a defendant's home computer while he or she was away at work.

The crux of mounting such a defense, however, is the ability to involve experts in the case from the start. Simply put, computer-based child pornography cases cannot be successfully defended without the aid of experts, which is precisely why the restrictions created by the bills are so problematic.

Any comprehensive defense of computer-based child pornography cases must involve a computer forensics examiner and a digital imaging expert. The sole purpose of a computer forensics expert is to determine how an image came into existence on a hard drive or other electronic storage device. A computer forensics examiner can also determine the precise time at which an image appeared on a hard drive and whether a computer user tried to delete the image. To conduct such an analysis, a forensics examiner needs to run software on the hard drive in question.

The two most widely used forensics software programs are EnCase and Forensics Toolkit. Using these programs, a forensics examiner can index data and search a computer for keywords associated with child pornography and hash values. A hash value consists of a unique series of 26 numbers and letters used to identify an image.[5] An average computer forensics examination can take up to 50 hours and requires special equipment that only forensics examiners own. Upon completion of a computer forensics examination, the examiner typically collaborates with additional experts, including a digital imaging expert.

A digital imaging expert is necessary to authenticate an image or video, both in terms of its recording and content. With respect to content, an imaging expert may be able to detect the extent to which an image has been manipulated. With ubiquitous software programs such as Photoshop, images of adults can be morphed to such an extent that the images ostensibly portray children. In most instances, whether an image portrays a real or virtual child cannot be determined by the naked eye or even by a photographic expert.[6] As an initial step in the analysis, a digital imaging expert may compare the image in question with photos from the National Center for Missing and Exploited Children database. The expert's primary job, however, is to conduct a frame-by-frame analysis on the image to search for inconsistencies evidencing digital manipulation. Common inconsistencies include conflicting content, distorted scale, imprecise shadows, and discrete pixel edges indicative of cutting and pasting.[7]

It is important to note that the difficulties created by the bills are not limited to the realm of experts who rely on electronic equipment to carry out their analyses. They also present obstacles for investigators, and psychiatric and medical experts upon whom defense attorneys may call to establish applicable affirmative defenses and for preparation of sentencing.

An Uneven Playing Field

Various legal arguments have been raised challenging the constitutionality of the Adam Walsh Act provision, § 3509 (m), and they are equally applicable to the bills' proposal. Presently, the arguments fall into five broad categories: discovery rules, work product and attorney-client privilege, defense attorneys as officers of the court, due process, and fair trial rights.

1. Discovery. Wis. Stats. s. 971.23 (1), entitled "Discovery and inspection," provides that the state must permit a defendant to inspect and copy information the government possesses if the information is material to the preparation of a defense, and specifically "any physical evidence that the district attorney intends to introduce at trial."[8] In stark opposition to the dictates of the discovery rule, the bills expressly prohibit the copying of evidence material to a defense in child pornography proceedings.

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[5] The National Center for Missing and Exploited Children maintains a database of hash values for known images of child pornography.

[6] See *United States v. Frabizio*, 445 F.Supp.2d 152, 170 (D. Mass. 2006).

[7] For an easily readable overview on some of the technology involved in digital imaging, see *Frabizio*, supra note 5. The *Frabizio* decision involved the defense's Daubert challenge to the government's digital imaging expert. The court held that the government expert's methodologies were not sufficiently reliable to withstand the Daubert test.

[8] Wis. Stats. sec. 971.23 (1) (g).

To support the restrictions on defense counsel created by § 3509(m), federal prosecutors regularly rely upon ***United States v. Kimbrough***,[9] which declined to find that the federal discovery Rule 16 permits the copying and distribution of child pornography for defendants.

Despite the outcome of ***Kimbrough***, several district courts have reached contrary conclusions. For example, in ***United States v. Frabizio***,[10] the court granted the defendant's motion for production of discovery and held that the defendant was entitled to obtain copies of the images seized in order to enable defense counsel to investigate how and when the images came to appear on the computer.[11] This holding is consistent with the Rule 16 Advisory Committee Notes, which explain that "broad discovery contributes to the fair and efficient administration of criminal justice by providing the defendant with enough information to make an informed decision as to [a] plea . . . and by otherwise contributing to an accurate determination of the issue of guilt or innocence."[12] Plainly, by requiring material allegedly constituting child pornography to remain in the control of the government, the bills frustrate the rules governing discovery and makes it exceedingly onerous to prepare a defense.

2. Attorney work product and attorney-client confidentiality. In addition to contravening the general principles and rules of discovery in s. 971.23, proposed sub. (11) jeopardizes attorney work product for two reasons. First, if a computer forensics examiner is forced to carry out his examination and analysis at a government facility using government-owned computers, any tests conducted will leave on the computer's hard drive a roadmap of the examiner's investigation. Second, when experts are forced to conduct their analyses at a government facility, the government learns the identity of defense experts and can anticipate and decipher the direction of the defense strategy.

The Work Product Doctrine affords the defense a "zone of privacy" to prepare its case.

> In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.[13]

In the early stages of the litigation, if the government does not have to reveal the experts with whom it is working, why should the defense? Furthermore, if the government knows that defense counsel has contacted an expert, but does not intend to call the expert to testify, further complications and concerns for the protection of attorney-client confidentiality also arise.

3. Defense attorneys as officers of the court. Another concern is that the bill ignores the fact that defense attorneys are officers of the court. Proposed s. 971.23 (11) implicitly makes an unwarranted attack on the trustworthiness of defense attorneys. The preamble to the Wisconsin Rules of Professional Conduct for Attorneys states that "[a] lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."[14] Although a defense attorney exists as an officer of the legal system, the bills require material constituting child pornography to remain in the control of either the government or the court. The statute expressly precludes a defense attorney from possessing the evidence despite the fact that in litigation to date, government attorneys have failed to present any evidence of defense attorneys who

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[9] 69 F.3d 723 (5th Cir. 1995).

[10] 341 F.Supp.2d 47 (D. Mass 2004).

[11] See also *United States v. Hill*, 322 F.Supp.2d 1081 (C.D. Cal. 2004) (finding that the defendant would be "seriously prejudiced" if his expert and counsel did not have copies of the 1,000 images of child pornography discovered on zip diskettes taken from the defendant's home); also see *United States v. Winslow*, 2008 U.S. Dist LEXIS 66855 (D. Alaska 2008), finding that the government's conditions for the defense's review of the computer hard-drive seized in the case violated the defendant's due process, fair trial and Sixth Amendment rights. As a result, the court ordered the government to provide the defense attorney with a copy of the hard drive, under specified conditions.

[12] Rule 16 Advisory Committee Notes, 1974 Amendments, quoted in *United States v. Cadet*, 423 F.Supp.2d 1, 3 (E.D.N.Y. 2006).

[13] *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947).

[14] Rules of Professional Conduct for Attorneys, Chapter SCR 20, preamble (1987). See also *Powell v. Arkansas*, 287 U.S. 45, 73 (1932) (holding that defense attorneys are officers of the court and have a duty to render service to the accused).

have lost or released images of child pornography in circulation. In essence, the bills presuppose that an agent of the government will adhere to a law governing the circulation of contraband and a defense attorney will not.

4. Right to due process of law. The potential infringement of a defendant's due process rights, by restricting a defendant's access to material evidence, is also clear. According to the Supreme Court, "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations."[15] By limiting defense counsel's access to critical evidence and by requiring defense experts to conduct their analyses in government facilities, the bills create unwarranted obstacles thwarting trial preparation.

The bills transform trial preparation into a more costly and unduly burdensome exercise. If the defense attorney wishes to utilize experts, the experts must travel to government offices with fragile equipment not conducive to transport. The SPD budget for experts is already under-funded. When an expert's fees are combined with the fees associated with travel time and the cost of transporting and reassembling equipment, the cost of independent analysis will be untenable. Experts who testified at the *Knellinger* hearing indicated that the conditions created by § 3509 (m) have caused them to reevaluate their willingness to become involved in defense work for criminal cases.[16] An additional burden experts will encounter when they seek to collaborate with other experts is the difficulty of coordinating their schedules to comply with the limited availability of evidence at a government facility. On the whole, the time restrictions and inconvenience imposed by having to work in a government facility make defense work undesirable for experts, and in turn, more costly to the SPD.

Besides creating obstacles for defense attorneys, their investigators and experts, the bills make it exceedingly difficult to have an incarcerated defendant view the evidence. Defense attorneys have an ethical duty to review evidence against their clients, with their clients. Having the defendant view the images that he or she is charged with possessing is critical to providing effective representation. As with every other type of criminal case, it is only when the client has actual access to the evidence against him (or her) that the client can make informed decisions and truly exercise the constitutional right to present a defense. Moreover, having the client view the evidence facilitates a meaningful discussion about the possibility of a negotiated plea agreement, and allows the defense attorney to make informed decisions about trial strategy. If defense counsel wishes to review the evidence with the client, counsel must arrange for the client to be transported to a government facility. If arrangements cannot be made, defense counsel is forced to forgo this significant element of trial preparation. Assuming arrangements can be made to have the incarcerated client transported to the location of the evidence; defense counsel faces the difficulty of speaking with a client in an intimidating environment that fosters neither trust nor candor.
The difficulties in implementing access for a defendant who chooses self-representation are noted but will not be explored.

The problems created by the bills continue to multiply after trial has begun. Throughout the course of trial, witnesses testify and strategy changes. For these reasons, any prudent defense attorney constantly wants to consult the evidence, which is not possible under the bills. Even if the government proposes holding the digital evidence at the court in a workroom with late-evening access, it is unlikely that such access will be comparable to that afforded to a defense attorney who possesses a copy of the evidence in his or her own office. Under these conditions, not only is counsel hindered from reviewing evidence, but the likelihood of being able to review the evidence with experts also becomes exceedingly difficult.

5. Fair trial rights. The bills also have a negative impact on Sixth Amendment fair trial rights. Under the Sixth Amendment, a defendant may confront witnesses against him and avail himself to compulsory process for obtaining witnesses on his own behalf. In ***Kentucky v. Stincer***, the U.S. Supreme Court stated that a "rule that precludes a defendant from access to information before trial may hinder that defendant's opportunity for effective cross-examination at trial, and . . . such a rule equally may violate the

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[15] *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973).

[16] *United States v. Knellinger*, 471 F.Supp.2d 640 (E.D. Virginia, 2007) (Finding, based on extensive expert testimony, that a reasonable computer expert would not agree to take a case in which he or she was required to examine the hard drive on government premises because of the expense and the difficulty of moving their equipment to a government facility and the inability to provide adequate assistance under those conditions. Thus, the court held, because "ample opportunity" for inspection was not available at a government facility, a mirror image had to be provided to the expert.

Confrontation Clause."[17] The bills clearly limit a defendant's access to material evidence, and as such, undermine the Confrontation Clause. Restricted access to a hard drive or other storage device containing purported child pornography hampers defense experts' ability to verify the sufficiency of the evidence and integrity of the government's investigative techniques, which in turn limits defense counsel's ability to effectively cross-examine government witnesses.

The bills also erode a defendant's right to compulsory process. The Compulsory Process Clause protects a defendant's right to present his version of the story — a right that is a critical feature of our adversarial system. "The right to offer the testimony of witnesses, and to compel their attendance . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies."[18]

The defendant's right to effective assistance of counsel includes the right to a reasonable investigation.[19] Counsel for a defendant cannot thoroughly prepare a defense under the conditions that would be created by the enactment of the bills.

Inefficiency

Finally, the bills provide an extremely inefficient vehicle by which all of these obstacles can be addressed, which is that the court may provide a copy of the materials to the defense if the court finds that a copy of the item or material has not been made reasonably available to the defense.[20] "Reasonable available" means sufficient opportunity for inspection, viewing and examination at a law enforcement or government facility.[21] And so the defense will be required to present evidence of the difficulties in mounting a defense in each one of these cases, and the courts will be required to order that copies be made available to the defense for testing and examination in each of these cases.

If copies are turned over to the defense, the bills require the court to enter a protective order limiting the dissemination of the evidence and requiring it to be returned at the completion of the trial.[22] Ironically, the courts are empowered to enter such protective orders under current law when necessary.[23] The courts may deny, limit or delay discovery and inspection on the motion of any party. It is more efficient to presume that officers of the court will respect the orders of the court forbidding further disclosure and the laws prohibiting dissemination of contraband than it is to presume otherwise and require all defense attorneys to show a need to mount a defense in every case. Current law appears to be efficiently and effectively handling these issues.

The bills ignore the fact that defendants in our justice system are presumed innocent until proven guilty. Regardless of the heinous nature of charges involving child pornography, defendants are entitled to the fairness inherent in the American legal system.

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[17] 482 U.S. 730, 738 n.9 (1987) (Blackmun, J.).
[18] *Washington v. Texas*, 388 U.S. 14, 19 (1967), quoted in *Taylor v. Illinois*, 484 U.S. 400, 409 (1987).
[19] *Strickland v. Washington*, 466 U.S. 668 (1984).
[20] Proposed s. 971.23 (11) (c) 1.
[21] Proposed s. 971.23 (11) (a) 2.
[22] Proposed s. 971.23 (11) (c) 2.
[23] Sec. 971.23 (6)

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TO: Members, Assembly Committee on Criminal Justice and Corrections

FR: Attorney General J.B. Van Hollen

DT: June 2, 2011

RE: Written Testimony in Support of 2011 Assembly Bill 100

Chairman Bies, members of the Assembly Committee on Criminal Justice and Corrections, I write to you today in support of AB 100, relating to penalties for certain child sex crimes and certain evidentiary recordings. AB 100 is a redraft of 2009 AB 769, a bill that DOJ drafted and shared with Represenative Staskunas and Senator Lassa. What follows is my written testimony on 2009 AB 769 and is applicable to 2011 AB 100:

This bill furthers our goal in protecting our children who may become or who are victims of Internet sexual predators.

Public safety is my number one priority at the Department of Justice. As many on this Committee are aware, the Department of Justice – Division of Criminal Investigation coordinates the State's Internet Crimes Against Children Task Force. We currently have over 130 local law enforcement affiliates in the task force from across the state - up from 22 when I first took office. Investigation of, prosecution of, and prevention of Internet crimes against children is and will continue to be my priority as Attorney General.

The responsibilities of the Internet Crimes against Children (ICAC) Task Force are many. DOJ provides investigative and prosecutorial assistance to police agencies and prosecutors, conducts investigations, refers cases to U.S. Attorneys and District Attorneys for prosecution, and in certain cases, for example where a district attorney has a conflict, prosecutes offenders. We provide training to law enforcement officers, prosecutors, parents, teachers, and other community members. Just last year alone, we hosted over 300 educational forums around the state. In addition, we foster continual statewide and regional coordination, collaboration, information sharing, networking, and service integration.

So how serious is the problem of Internet crimes against children? Over 22,000 unique internet protocol addresses - in Wisconsin alone - have downloaded child pornography. In addition, the Task Force, through undercover Internet investigations, continues to identify and apprehend people who use the Internet as a means to identify, groom, and solicit children for sexual activity.

Here's how this bill strengthens our fight against sexual predators.

First, the bill modifies the criminal "attempt" statute and, if enacted, would result in increasing the maximum possible penalty for the act of attempting to solicit a child online for sexual activity and the act of attempting to cause a child to view or listen to sexually explicit material. Under current law, attempts to commit those acts are punishable by one-half the maximum for the completed crime. The bill would make the maximum penalty for the "attempt" equal to that for the completed crime. Courts would retain discretion to sentence the offender as they see fit within the sentencing range.

The "use of a computer to facilitate a sex crime" is basically online child enticement. It occurs when, for example, an Internet predator communicates with a child, or a person they believe is a child, over the Internet for the purpose of enticing them to a face-to-face contact with the intent to have sexual contact or sexual intercourse with the child. To be found guilty, a predator must also undertake an act to effectuate that intent. That purposeful act usually takes the form of arranging a meeting place and travelling to the scene. These cases are often referred to as "traveler" cases. The completed crime is punishable as a Class C felony with a maximum term of imprisonment of 40 years, 25 years of which may be confinement. Under current law, an attempt to commit online child enticement is punishable by one-half of the penalty for the completed crime. While my office (and most prosecutors) take the position that the current statutory language permits prosecutors to charge a completed crime (and seek full penalties) even when the offender is communicating with an adult undercover officer, some prosecutors have felt obliged to charge such cases as "attempts" because the officer is not a child.

"Causing a child to view or listen to sexual activity" is a crime that is committed by one who intentionally causes a child to view or listen to sexually explicit conduct for the purposes of sexually gratifying himself or humiliating or degrading the child. It is common for Internet predators engaging in "chats" with children or undercover officers posing as children, to send the "child" sexually explicit images or videos of themselves or others and to request the same material from the child. This often takes the form of webcam displays of the offender exposing himself and/or sexually gratifying himself. A violation of this law is a Class H felony if the child is between 13 and 18 years of age and a Class F felony if the child is under the age of 13. Because this statute requires that a child be exposed to this material by the offender, providing it to an undercover officer online is only punishable as an attempt.

Commission of these crimes against actual children can only be detected by law enforcement if they are reported. Studies routinely show that most sex crimes, including most child sex crimes, go unreported. Moreover, some reported cases may not contain sufficient information to make for a prosecution. Undercover operations where an officer portrays himself or herself as a child are often the best way to stop online sex predators.

Let me provide a well-known example in the traveler context, a case that exemplifies online enticement. The Department of Justice – Division of Criminal Investigation received credible information showing that former Racine mayor Gary Becker was engaging in sexually explicit

chat logs with children, or those who appeared to be children. What was known was his Internet "handle." Using this information, Becker was quickly identified in a live chat room environment by an online undercover Division of Criminal Investigation special agent. Becker planned a meeting for the purposes of having sexual contact with what he thought was an underage girl, he went to the meeting, and he was arrested, charged, and ultimately convicted. Without these undercover investigations, online predators like Becker would be free, and their online enticement would lead to the victimization of an untold number of children.

It is the right public policy to ensure that online predators are subject to the same maximum penalty whether the case is investigated by undercover officer or whether the case comes from a parent reporting the abuse of a child. The defendant's conduct is the same. Make no mistake - those who are using the internet to engage solicit children for sexual purposes are not generally doing it for the first time when an officer is on the other end of such an encounter. Countless children may have already been victimized – and these operations are the best way to that predator again. Charging cases investigated by undercover officers as completed crimes follows the same logic that today allows the state to charge a drug trafficker with a completed crime even when his sale is to an undercover officer. Moreover, in the crimes against children code, an attempt to entice a child for sexual purposes in the physical world – the crime of child enticement – has always been punishable to the same extent as the completed act.

Second, the bill relates to updating and clarifying the criminal discovery rules as it relates to the control of images or video depicting child pornography.

In criminal prosecutions, the government ordinarily maintains possession and control of contraband items. Therefore, the criminal defendant and his defense team have limited access to the actual contraband, for example, drugs or illegal weapons. Other evidence is made available to the defense, such as copies of reports, witness statements, and laboratory results.

Images or videos of children engaged in sexually explicit conduct are contraband by definition as it is illegal to possess, copy, or disseminate that material. Unfortunately, child pornography content, especially in digital form, has often been treated for the purpose of criminal discovery as merely "evidence" held by the State rather than as contraband. Defendants charged with possessing child pornography routinely seek copies of the material in discovery so that their retained computer forensic experts can review and analyze the digital material at their own private workplaces. The state has been ordered to copy and distribute this contraband material to defense attorneys or defense experts.

This legislation would amend the criminal discovery statute to specifically address the treatment of this particular brand of contraband. The bill creates a presumption that child pornography content will not be disseminated outside of government control unless the government cannot or does not make that material reasonably available to the defense team for inspection and analysis at a government facility. This proposal also provides a defendant with the opportunity to convince the court that defense access to the material outside of the government facility is necessary in that case. In sum, the legislation protects children while preserving the defendant's ability to present a defense to the charges he faces.

The legislation's approach is new to the State, but it is not novel. This approach is modeled after a similar federal rule adopted in 2006 by the United State Congress (18 U.S.C. 3509(m)). That federal rule only governs practice in federal courts – including those in Wisconsin – but is not binding on state courts. Many federal courts have reviewed this rule against challenges from defendants and, without exception, those courts have pronounced it to be a constitutional balance between the defendant's right to prepare and present a defense and the government's legitimate interest in securing this contraband. This proposal strikes the same balance.

This specific statutory language regarding the control over this particularly repugnant form of contraband is justified in part by the unique nature of the contraband. Child pornography content in digital form can be easily copied and disseminated further, and thus should be controlled as tightly as possible, so as to minimize the risk of it being accidentally or intentionally re-produced or disseminated and, thereby, re-victimizing the children depicted. It must be remembered that "child pornography" is not just a picture – it is often the documentation of the sexual assault of a very real child victim.

Let me be clear. I am not suggesting that all, or even any, defense attorneys or private computer forensic experts would intentionally reproduce or disseminate this material or otherwise use it improperly. But there are examples in this state where prosecutors, courts, and defense counsel who have been given access to this kind of material have not treated it with the absolute security it should receive.

Twice in the last two years Department of Justice appellate lawyers had made requests from circuit court clerks for copies of the trial court record for appeal purposes. When they received the court records, the materials provided included unsealed copies of child pornography content that had been received by the court as exhibits. Our staff attorneys immediately made arrangements to secure those copies with law enforcement and to secure the court record. In another example, an attorney representing a defendant on appeal similarly received copies of the contraband images from a court, copied them himself, and mailed copies to his client in the Wisconsin State Prison system. Prison staff intercepted them before the inmate received the images. I don't want to think of what the prisoner would have done if prison staff had not been alert.

These examples underscore the potential for inadvertent dissemination of child pornography and support the notion that our law should specifically address the handling of this contraband by the courts in discovery to limit inadvertent dissemination. This legislation would specifically exempt these images from public records law all while requiring courts, law enforcement, and district attorneys to maintain custody of the material and not provide copies for distribution outside of their control.

Members, I wholeheartedly support this legislation. I want to thank Senator Julie Lassa and Representative Tony Staskunas for authoring this legislation and working with my office to develop it. I ask this Committee to support this bill. Thank you.